Nos. 85-971, 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,
v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,
v.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF INDEPENDENT BANKERS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether offices of national banks that offer discount brokerage services are "branches" within the meaning and intent of Section 7(f) of the McFadden Act, 12 U.S.C. 36(f), and therefore are subject to the state-law restrictions upon branching that are expressly incorporated in Section 7(c), 12 U.S.C. 36(c).

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BRIEF OF INDEPENDENT BANKERS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

The Independent Bankers Association of America ("IBAA") appears herein as *amicus curiae*, with the consent of all parties,[1] in support of respondent Securities Industry Association.

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[1] Letters indicating the consent of all parties to the filing of this brief have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

The IBAA is a non-profit Minnesota corporation, with headquarters in Washington, D.C., and offices in Sauk Centre, Minnesota, which represents more than 7,000 commercial banks, both national and state-chartered, in all 50 states and the District of Columbia. The members of the IBAA are interested in the principle that the individual states, under the McFadden Act, 12 U.S.C. § 36 (1976) (the "Act"), have the right to determine the structure of the banking industry within their borders. If petitioners are successful in asserting that the definition of "branch" is limited to only those national bank facilities offering one or more of the three services enumerated as examples in subsection (f) of the Act—*viz.*, "deposits are received, or checks paid, or money lent"—the Comptroller will be free to permit national banks to provide all other banking services at non-chartered offices without regard to the state-law restrictions on branching that are expressly incorporated by the Act. Such a result would violate the congressional policy of "competitive equality" by disrupting the existing competitive balance in branching between state and national banks and would displace the states from their congressionally-mandated role as decision-makers in determining the structure of banking operations within their respective borders.

In this brief, IBAA addresses only the issue of whether national bank facilities offering discount brokerage services are "branch" banks, an issue of immediate interest to the IBAA. IBAA has appeared as a party and as *amicus curiae* on numerous occasions in court actions and administrative proceedings relating to the preservation of the Act's policy of "competitive equality" between national and state banks in the area of branching.

INTRODUCTION AND SUMMARY OF ARGUMENT

This action arises from a challenge by Respondent Securities Industry Association ("SIA") to the Comptroller's approval of applications by two national banks to establish or purchase subsidiaries offering discount brokerage services. Union Planters National Bank of Memphis sought approval for its acquisition of Brenner Steed and Associates, Inc., a discount brokerage business. As set forth in its application, Union Planters proposed to offer discount brokerage services (through an operating subsidiary) at specified branch offices and affiliates within Tennessee, as well as at correspondent banks in Tennessee and six other states. Petitioner Security Pacific National Bank ("Security Pacific") proposed to establish a new operating subsidiary that would offer brokerage services at certain Security Pacific branch offices and, in the future, at non-branch offices located in California and other states. The Comptroller approved Security Pacific's application in a decision issued August 26, 1982; Union Planter's application was approved on September 30, 1982.[2]

In its Security Pacific decision, the Comptroller found that neither the prohibitions of the Glass-Steagall Act nor the branching restrictions of the McFadden Act precluded approval of the application. In his analysis of the McFadden Act, the Comptroller observed that the Act defines a branch as including "any branch bank . . . or any branch place of business . . . at which deposits are

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[2] *See* Decision of the Comptroller of the Currency on the Application of Security Pacific National Bank To Establish an Operating Subsidiary to be Known as Security Pacific Discount Brokerage Services, Inc. ("Comptroller's Decision") (Aug. 26, 1982), attached to the *Comptroller's Petition for cert.* (Nos. 85-971, 85-972) ("Comptroller's Pet.") as Appendix D ("Comptroller's Pet. App. D") at 30a-46a; Letter to Richard C. Raines, Senior Vice President, Union Planters National Bank of Memphis from James E. Brennen, Office of the Comptroller of the Currency. Comptroller's Pet. App. E at 47a.

received, or checks paid, or money lent" and concluded that, because the proposed brokerage facilities would perform none of these enumerated functions, the facilities were not "branches" within the meaning of the Act. Comptroller's Pet. App. D at 39a-43a.

Briefly considering the possibility that the facilities could, nonetheless, be deemed "branches," the Comptroller acknowledged that the Eighth Circuit had concluded that a national bank office providing only trust services (a non-enumerated function) was a "branch" because it offered banking services to the public away from the main office and branches of the bank. *St. Louis County National Bank* v. *Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (*"Mercantile Trust"*). However, the Comptroller summarily dismissed the Eighth Circuit's decision as "an overly broad reading of the statute". Comptroller's Pet. App. D at 43a.

The district court below flatly rejected the Comptroller's assertion that the definition of "branch" encompasses only those facilities at which the three services enumerated as examples in subsection (f) are offered. In the court's opinion, this "literal reading" of the statute was "contradicted" by the legislative history of the McFadden Act and by decisions of other courts. In particular, the court noted with approval the Eighth Circuit's *Mercantile Trust* decision. *Securities Industry Association* v. *Comptroller of the Currency*, 577 F. Supp. 252, 260 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir.), *reh'g denied en banc*, 765 F.2d 1196 (1985); Comptroller's Pet. App. C at 27a.

Applying the Eighth Circuit's analysis, the district court found that the provision of discount brokerage services was "clearly aimed at attracting and servicing customers conveniently." 577 F. Supp. at 260; Comptroller's Pet. App. C at 28a. On the basis of this finding and the court's holding that the provision of discount

brokerage services by a national bank is not prohibited by the Glass-Steagall Act, the court concluded that brokerage business is within the category of "general business" banks may transact only at their main office and at authorized branches. Provision of securities brokerage services was, therefore, subject to the locational limitations of 12 U.S.C. § 81 [3] and 12 U.S.C. § 36.[4]

On appeal to the Court of Appeals for the District of Columbia, the district court's decision was affirmed *per curiam*, "generally for the reasons stated in [the district court's] Memorandum Opinion." *Securities Industry Association* v. *Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985); Comptroller's Pet. App. A at 1a-3a. The Comptroller and Security Pacific filed timely petitions for *certiorari* with this court on December 9, 1985. On March 4, 1986, this Court granted *certiorari* and consolidated the cases for review. 106 S. Ct. 1259.

IBAA submits that the courts below correctly held that national bank facilities providing discount brokerage services are "branches" within the scope of the McFadden

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[3] Section 81 provides that a national bank may transact its "general business" *only* in the place "specified in its organization certificate" and in any branch "established or maintained by it in accordance with [12 U.S.C. § 36]." 12 U.S.C. § 81 (1982).

[4] The Court also dismissed the Comptroller's novel contention that the restrictions of the McFadden Act were applicable only to intrastate branching, stating:

> [This contention] ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions for the location of bank offices, which previously had allowed national banks only one central office. Never have any national banks been authorized under the National Bank Act to maintain offices outside their home state.

577 F. Supp. at 260; Comptroller's Pet. App. C at 28a. *See infra* 10-11 and note 10.

Act. Accordingly, a national bank may establish such facilities only in its home state and only at locations where competing state banks would be authorized under state law to establish comparable facilities. The Comptroller's assertion that the definition of "branch" applies *only* to bank facilities offering one or more of the three services enumerated as examples in the Act, is not supported by the language of the Act, its legislative history, or the many judicial interpretations of the Act. Indeed, as this Court has confirmed, Congress plainly intended the definition of "branch" to be expansively construed to ensure that Congress's principal concern for maintaining competitive equality between the state and national banking systems is not subverted. *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 134 (1969) ("*Plant City*").

This congressional interest in maintaining competitive equality is served only if a "branch" continues to include all national bank facilities providing authorized bank services to the public which would afford a competitive advantage over competing state banks not similarly authorized. The discount brokerage facilities at issue here clearly meet these requirements. The courts below found that the securities brokerage business is authorized as a recognized banking business under 12 U.S.C. § 24 (1982), and that national banks which offer these services at off-premises facilities will obtain a distinct competitive advantage over state banks not similarly authorized. National bank facilities at which discount brokerage services are offered must, therefore, be held to constitute "branches" subject to state restrictions on branching as established by the McFadden Act.

ARGUMENT

I. THE COURTS BELOW CORRECTLY INTERPRETED THE McFADDEN ACT

The McFadden Act provides that a national bank may establish and operate "branches" (i) within the city or town in which the bank is situated, but only if that operation is "expressly authorized to State banks by the law of the State in question", 12 U.S.C. § 36(c), *and* (ii) at any other point within the bank's home state, but only if such establishment and operation are

> authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively . . . and subject to the restrictions as to location imposed by the law of the State on State banks.

Id. For purposes of these restrictions,

> [t]he term "branch" as used in this section shall be held to *include* any branch bank, branch office, branch agency, additional office, or any place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f) (emphasis supplied).

The Act's sponsor, Representative McFadden, explained the intended scope of the "branch" definition in Section 36(f) as follows:

> *Any place* outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office, is a branch.* . . .

68 Cong. Rec. 5,816 (1927) (statement of Rep. McFadden) (emphasis supplied).[5] This Court has confirmed

[5] The Comptroller's attempt to denigrate the value of Representative McFadden's analysis of § 36(f) is flatly contradicted by the decisions of this Court in *Plant City*, 396 U.S. at 134 n.8, the Court

that the definition of "branch" must be applied in an expansive manner that preserves the congressional policy establishing competitive equality in branching between national and state banks. *Plant City*, 396 U.S. at 134. Accordingly, the definition of "branch" clearly was intended by Congress to include *any* national bank facility away from the main office where the bank transacts any banking business with the public which offers a competitive advantage over competing state banks that are not authorized to operate comparable facilities at comparable locations. As the courts below found, this interpretation is fully consistent with the historical context, the overall legislative history and the clear congressional policy underlying the Act.

A. The Legislative History Establishes That the Preservation of Competitive Equality Is the Fundamental Purpose of the McFadden Act

The McFadden Act resulted from Congress' recognition that, prior to 1927, a serious competitive imbalance had been created by the inability of national banks to branch and the explosive growth in the practice of branching by state banks. *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257-58 (1966) ("*Walker Bank*"). Prior to the Act's passage, national banks were authorized under the National Bank Act of 1864 to transact their "usual business" only in "an office or banking house located in the place specified in its organization certificate". National Bank Act of 1864, ch. 106, § 8, 13 Stat. 99, 102 (1865). As interpreted by the Attorney General, and subsequently by this Court, this statute limited national banks to one place of business, thereby prohibiting national banks from lawfully establishing

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of Appeals in *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 931-32 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) ("*IBAA* v. *Smith*"), and the Eighth Circuit in *Mercantile Trust*, 548 F.2d at 719, each of which viewed Representative McFadden's analysis as authoritative.

branches pursuant to their incidental power to carry on the banking business. *See First National Bank In St. Louis* v. *Missouri ex rel. Barrett*, 263 U.S. 640 (1924); *Lowry National Bank*, 29 Op. Att'y Gen. 81 (1911). As a result, efforts by national banks to compete in states permitting branching by state banks were substantially impeded.

Recognizing that this competitive imbalance threatened the continued existence of the national banking system,[6] legislation was introduced in Congress to equalize national and state branch banking. The merits of branch banking and the impact of congressional authorization of branching by national banks were sharply disputed. Some opponents of the legislation feared that any authorization of branching would lead to the destruction of unit banking and the rise of banking monopolies and absentee credit control. *See, e.g.*, 66 Cong. Rec. 1,624 (1925) (statement of Rep. Goldsborough); 66 Cong. Rec. 924 (1925) (statements of Rep. Frear); 66 Cong. Rec. 1,575 (1925) (statement of the American Bankers Association). Proponents of the bill acknowledged the potential dangers of branching, but argued that the crisis situation demanded relief. They emphasized the limited nature of the branching powers authorized by the proposed legislation, *i.e.*, it would permit only citywide branching and would enable national banks to meet the increasing needs of large metropolitan areas for convenient banking facilities. *See, e.g.*, H.R. Rep. No. 583, 68th Cong., 1st Sess. 1 (1924) (emergency situation); 66 Cong. Rec. 1,645, 1,767 (1925) (remarks of Rep. McFadden); 66 Cong. Rec. 1,775 (1925) (remarks of Rep. Watkins).

A legislative compromise was finally achieved in 1927, with the passage of the McFadden Act. Under the Act,

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[6] In his annual report of 1923, the Comptroller of the Currency stated that continued unlimited branching by state banks "will mean the eventual destruction of the national banking system." H.R. Doc. No. 90, 68th Cong., 1st Sess. 6 (1924), *quoted in Walker Bank*, 385 U.S. at 257.

national banks were permitted to establish branches only within the city in which they were located and only if competing state banks were expressly granted similar privileges under state law. In this fashion the Act restored the competitive balance between the national and state banking systems, while ensuring that states would control the degree to which branching was permitted. *See Walker Bank*, 385 U.S. at 257-58.

The Banking Act of 1933, ch. 89, 48 Stat. 162 (1933), amended the McFadden Act by extending the branching privileges of national banks. Again, however, the Act's primary goal of preserving competitive equality based upon state control over branching was reaffirmed. In this regard, it is noteworthy that the Comptroller and his supporters in Congress proposed legislation in 1932 that would have authorized national banks to branch, *without regard to state law*, at any location within their home state *and* at any point outside such state located within 50 miles of their home office.[7] This proposal, however, was strenuously opposed on the ground that it would lead to the destruction of the state banking system, and it was defeated.[8] As a result, the 1933 amendment of the McFadden Act provided that national banks could branch only "within the borders of the State in which they exist," [9] and, even there "only to the extent that the State laws permit branch banking." [10] Representative Luce, a

[7] S. 4412, 72d Cong., 1st Sess. § 19 (1932). *See* S. Rep. No. 584, 72d Cong., 1st Sess. 11, 16 (1932).

[8] *See e.g.*, S. Rep. No. 584, *supra* note 7, Part II, 3-4 (minority views); *Walker Bank*, 385 U.S. at 259; Wilmarth, *The Case for the Validity of State Regional Banking Laws*, 18 Loy. L.A.L. Rev. 1017, 1024-25 (1985).

[9] S. Rep. No. 77, 73d Cong., 1st Sess. 11 (1933). *See* Wilmarth, *supra* note 8, at 1025.

[10] *Walker Bank*, 385 U.S. at 259, *quoting* 76 Cong. Rec. 2511 (1933) (remarks of Sen. Glass). In light of this legislative history, the Comptroller's suggestion that the McFadden Act was not intended to prohibit interstate branching by national banks is plainly without foundation. *See also Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545, 2551 (1985) ("At the time of the Bank Holding Company Act [of 1956], interstate branch banking was already prohibited by the McFadden Act.").

member of the conference committee on the Banking Act of 1933, declared that the amendment to the McFadden Act would preserve the principle of competitive equality in branching:

> In the controversy over the respective merits of what are known as 'unit banking' and 'branch banking' systems, a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches.

77 Cong. Rec. 5896 (1933), *quoted in Walker Bank*, 385 U.S. at 260.

The Comptroller contends that this legislative history indicates that Congress's primary concern when debating the Act was that authorization of branching would permit national banks to gain a monopoly over capital and credit. Therefore, he argues, the restrictions imposed on branching were intended to apply only to bank offices in which one or more of the three enumerated services would be offered, because monopoly control could be obtained only through these three banking services.

While the debates do reflect the concern of some members of Congress that branch banking would promote monopoly control, the complete legislative history plainly reveals that the *primary* purpose of the McFadden Act was to preserve competitive equality between national and state banks through the mechanism of state control over branching. Any subsidiary concerns regarding con-

centration were accommodated by limiting the scope of authorized branching for national banks to that permitted to state banks.

In *Plant City*, this Court affirmed that the McFadden Act "has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster 'competitive equality' ".[11] Similarly, in *IBAA* v. *Smith*, the D.C. Circuit, after reviewing the legislative history in detail, declared that the overriding purpose of the Act was to establish competitive equality through federal deference to state branching laws:

> Thus, the Act and its subsequent amendments restored competitive equality to the dual banking system by confining national banks to the branching policies of the individual states. This also eliminated discrimination between state and national banks in terms of ability to branch while maintaining the preeminence of state authority in the field. Control of the nature and extent of state and national bank branching was left to the states.

534 F.2d at 930-31.

B. The Definition of "Branch" Must Be Applied in Accordance With the Principle of Competitive Equality

In *Walker Bank* and *Plant City*, as well as in a long line of subsequent circuit court decisions,[12] the courts have applied a flexible definition of "branch" which fulfills the

[11] 396 U.S. at 131, *quoting Walker Bank*, 385 U.S. at 261.

[12] *E.g., Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (*"Fort Collins"*); *Illinois* v. *Continental Illinois National Bank and Trust Company of Chicago*, 536 F.2d 176, 178-79 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); *IBAA* v. *Smith*, 534 F.2d at 931-32, 938, 942; *Mercantile Trust*, 548 F.2d at 717-19.

McFadden Act's purpose of establishing and maintaining competitive equality between national and state banks in the area of branching. The concept of competitive equality views competitive effect "from the standpoint of the bank customer",[13] and is not just one "consideration" in applying the branch banking laws; it is the "overriding policy" of the McFadden Act.[14]

Following that analytical approach, the courts below properly found that the offering of discount brokerage services by national banks, viewed in light of the policy of competitive equality, plainly fell within the scope of the "branch" definition in Section 36(f). *See* 577 F. Supp. at 260; Comptroller's Pet. App. C at 28a.

The congressional policy of competitive equality flatly contradicts the Comptroller's attempt to limit the "branch" definition only to facilities performing one or more of the three enumerated examples of branching activities. Indeed, as this Court has expressly recognized, the fulfillment of the Act's primary objective *requires* that the definition "must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank*." *Plant City*, 396 U.S. at 134.[15] Because the "branch" definition must be determined in light of this broad policy, any interpretation of that definition with respect to banking services must consider "all those aspects . . . that might give the bank an advantage in its competition for customers." *Id.* at 136-37.

[13] *IBAA* v. *Smith*, 534 F.2d at 943.

[14] *Driscoll* v. *Northwestern National Bank of St. Paul*, 484 F.2d 173, 175 (8th Cir. 1973).

[15] Significantly, in the footnote to its statement cautioning against a "restrictive" interpretation of the "branch" definition, this Court quoted Representative McFadden's explanation of the term "branch" which was relied upon by the district court below and is quoted *supra* on page 7. *See* 396 U.S. at 134 n.8.

As discussed more fully in Section II.-A., at pp. 18-21 below, securities brokerage is a recognized banking service and an effective tool in the competition between banks for bank customers. In the intense competition for customer deposits, particularly following the deregulation of interest rates which began in 1980 and was completed earlier this year, a bank's ability to assist customers in investing their funds is a major element in attracting and maintaining deposit and other customer relationships. The offering of discount brokerage by national banks therefore constitutes branch banking because it fits precisely within the broad interpretive parameters for application of the principle of competitive equality.

The Comptroller argues that only the three services specifically enumerated in Section 36(f) were intended to be included within the definition of "branch." The Comptroller's interpretation, however, is based upon a restrictive reading of section 36(f) which has been rejected by the courts below and is directly contrary to the substantial body of case law holding that the three banking services enumerated as examples in the Act are *not* the exclusive indicia of branch banking. This Court, for example, held in *Plant City* that the three listed services in section 36(f) are only those services that *"at the very least"* represent branching activities. 396 U.S. at 135 (emphasis supplied). This Court noted that "by the use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term." *Id.* Accordingly, the Court stated that the definition of "branch" *"may include more"* than only the three specified services. *Id.* (emphasis supplied).

Although purporting to be consistent with this broad interpretation of section 36(f), Brief for Federal Petitioner ("Compt. Br.") at 35, in fact, the Comptroller's restrictive reading is flatly contrary. Acceptance of the Comptroller's reading of the Act would mean that the Act's three specified examples of branch services constitute not only the *minimum* content of the term "branch" but the *maximum* as well—precisely the opposite of this Court's interpretation. Clearly, this Court *rejected* the concept that Congress intended a full enumeration of branch banking services in the Act, in favor of establishing a flexible standard of analysis to determine, on a case-by-case basis which—*not whether*—other banking services should be included within the definition of "branch".[16]

In *Mercantile Trust*, 548 F.2d at 718-20, relied on by the courts below, the Eighth Circuit held that a trust facility operated by a national bank in Missouri, at which customers were offered estate and trust services, was nonetheless a "branch" even though *none* of the services enumerated as examples in section 36(f) was offered at the facility. The court of appeals determined that (1) the services offered at the bank's trust facility were also routinely offered at the bank's main office; (2) the trust facility served to attract new customers; and (3) the facility offered increased convenience to the bank's customers and thereby gave the bank a competitive advantage over its competitors who were not permitted to offer the same off-premises services.

> In light of these factors, we hold that the establishment of such a permanent place of business as undertaken by Mercantile is a branch as contemplated by section 36(f). It should be emphasized that this holding is based on our interpretation of the lan-

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[16] 396 U.S. at 135-137. *Accord, IBAA* v. *Smith*, 534 F.2d at 931 ("Congress intended to include virtually all off-premises banking operations . . . within the Act's definition of "branch"); *Fort Collins*, 540 F.2d at 499 ("accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services."); *Mercantile Trust*, 548 F.2d at 719 ("the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking . . . . [E]ach case must be considered on its own facts to determine if a branch exists.").

guage of section 36(f) as explained by its own author's analysis, its construction given by other courts, and the purpose for its Congressional enactment.

548 F.2d at 719-20.

The foregoing cases confirm that the McFadden Act was adopted primarily to equalize competition between national and state banks in the conduct of the banking business through the establishment of additional bank facilities. Congress plainly did *not* intend to restrict this policy only to bank offices that offer at least one of the three enumerated services,[17] or only to the "traditional" types of bank offices.[18] Thus, *any* banking service offered to the public by a national bank at an off-premises bank facility which provides the bank a competitive advantage vis-a-vis state banks which are not authorized by state law to operate such a facility at the same location, was intended to be encompassed within the scope of the "branch" definition.

The Comptroller attempts to explain the Act's open-ended language by arguing that the use of the word "include" in section 36(f) was meant to refer *only* to other *locations* at which the enumerated services may be offered, not to other *services*. Compt. Br. at 28-29. However, this Court held in *Plant City* that the "branch" definition takes into account "*all* those aspects of" the proposed service which afford a competitive advantage over state banks, including *both* the service *and* the location at which the service is to be offered. 396 U.S. at 136-37 (emphasis supplied). Thus, if state banks either are not authorized under state law to provide similar banking *services* outside their main offices, or are not authorized to provide them at the same *locations* proposed by national banks, then the principle of competitive equality *requires* that national banks be permitted to offer the services off-

[17] *See* cases discussed *supra* note 16.

[18] *IBAA* v. *Smith*, 534 F.2d at 932.

premises only if, and to the same extent that, state banks may do so.

It is important to note that the conclusion of the courts below that discount brokerage offices *are* "branches" has *not* caused national banks to be *more* restricted than state banks in opening such offices. In states which *do* consider discount brokerage offices to be "branches", national banks are permitted to establish such offices to the same extent (and *only* to the same extent) that state banks may do so under state branching law. *See Plant City*, 396 U.S. at 130, 138. In states which do *not* consider discount brokerage offices to be "branches", and therefore do not subject such offices to state branching restrictions, it is nevertheless clear—as explained in *IBAA* v. *Smith*, 534 F.2d at 948-49 and n.104—that, under the principle of competitive equality, national banks *are* allowed to establish discount brokerage offices to the same extent that state banks may do so under state law.[19] Thus, the decisions below have preserved competitive equality in branching between national and state banks.

Petitioners complain that a national bank will not be permitted to establish discount brokerage offices *outside* its home state if such offices are deemed to be "branches".[20]

[19] The only restriction upon national banks in this situation would be that they must still comply with the federal branching regulations as to capitalization and Comptroller approval. *See IBAA* v. *Smith*, 534 F.2d at 949-50.

[20] Petitioners point out that such offices *can* be established across state lines if they are organized as bona fide *nonbanking* subsidiaries of a bank holding company. *See Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. 207 (1984); *Lewis* v. *B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980). Petitioners therefore assert that the national banks which are *not* subsidiaries of bank holding companies are disadvantaged with respect to those banks which are subsidiaries. The short answer to this complaint is that *all* banks may establish holding companies, and that neither the McFadden Act nor the Bank Holding Company Act was intended to establish "competitive equality" between non-holding company banks and holding company banks.

This prohibition on interstate branching, however, derives from the plain language and intent of the McFadden Act and is a matter for Congress—not the Comptroller or the courts—to remedy. *See supra* notes 7-10 and accompanying text; *Plant City*, 396 U.S. at 138. In addition, this situation does *not* create a practical competitive inequality between national banks and state banks, since the IBAA is not aware of any state statutes which permit state banks to operate discount brokerage offices or other branches across state lines.

II. THE COURTS BELOW PROPERLY APPLIED THE ACT TO THE OFFERING OF DISCOUNT BROKERAGE SERVICES BY NATIONAL BANKS

A. Securities Brokerage Is a Banking Service

Petitioners' argument that discount brokerage is a "nonbanking" function is inconsistent with petitioners' arguments below,[21] as well as the specific finding of this Court and other courts that national banks are empowered to provide this service as part of the banking business authorized by the National Bank Act.

National banks may exercise only those powers which are expressly granted to them or are incidental to their conduct of the business of banking. *First National Bank in St. Louis*, 263 U.S. at 656. The Comptroller and the courts below found that the right of national banks to provide discount brokerage services is based on their authority to engage in the limited securities activities specified in 12 U.S.C. § 24 (Seventh), and concluded that the provision of those services did not violate these statutory restrictions.[22] Thus, to the extent that the investment securities powers of national banks under the National Bank Act authorize the provision of securities brokerage services, those services are *banking*—not nonbanking— services. The Comptroller is quite wrong when he asserts that, in *Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. 207, this Court upheld the offering of discount brokerage services by bank holding company subsidiaries "because discount brokerage is a *nonbanking* activity that is 'closely related' to banking", and that "[t]here is thus little doubt that discount brokerage is not a traditional banking service". Compt. Br. at 41 (emphasis in original). In fact, this Court held exactly the *opposite*:

> [the Federal Reserve Board] found that the [discount brokerage] services were "operationally and functionally" very similar to the types of brokerage services that are generally provided by banks . . . .
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> * * *
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> Banks have long arranged the purchase and sale of securities as an accommodation to their customers. Congress expressly endorsed this *traditional banking service* in 1933.

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[21] *See, e.g.*, Compt. Br. at 31, 33, 37; Comptroller's Pet. at 14; Comptroller's Pet. App. D at 32a-37a; Brief of Petitioner Security Pacific ("Sec. Pac. Br.") at 24.

[22] The right of banks to engage in limited investment securities activities was specifically acknowledged in a proviso added to section 5135 (now 12 U.S.C. § 24 (Seventh)) by Section 2(b) of the McFadden Act. In enacting this proviso, Congress recognized that banks had already been performing investment securities functions for a number of years pursuant to their "incidental corporate powers to conduct the banking business". H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926). Congress did not, therefore, propose the amendment to § 24 as a grant of new power, but rather as an affirmation of an existing banking practice. *Id.*; S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926) (provision "recognizes and affirms the existence of a type of business which national banks are now conducting under their incidental charter powers").

This explanation of the amendment clearly indicates Congress's belief that the securities business that national banks were then conducting was part of the banking business. This is specifically supported by the description of the amendment as "confirmation and regulation of *an existing banking service*,". H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926) (emphasis supplied).

Securities Industry Association v. *Board of Governors of the Federal Reserve System*, 468 U.S. at 214-215 (emphasis supplied).

Petitioners further contend that even if the definition of "branch" does include services other than the three examples specified in subsection (f), the expansive standard adopted by the lower courts would bring within that definition every operation undertaken by a bank, even "peripheral" or "nonbanking" functions. Again, petitioners are wrong. Application of the decisions below do not, and will not, include within the scope of the "branch" definition *every* service performed by national banks. Rather, the lower courts correctly limited their holding to authorized banking services that, when provided to the public, afford national banks a competitive advantage over competing state banks not authorized to provide such services at the same locations. The decisions of the courts below accurately reflect the nature of brokerage services as an authorized banking service, and accord appropriate weight to the statutory goal of maintaining competitive equality between the state and national banking systems.

Other services performed by national banks (*e.g.*, "consulting services to other banks, business records maintenance for customers, check verification services for merchants, installation of electronic credit card verification terminals in stores, audit services for other banks and other customers, data processing services, and financial and investment consulting"), Sec. Pac. Br. at 30-31, are not *automatically* swept into the "branch" definition by the decision in this case. The decision below simply maintains the present statutory framework and policy of competitive equality regarding all off-premises services by national banks. These, or other banking services, are branch banking services only if, when judged on a case-by-case basis in light of the specific facts, they fit within the proper scope of the definition of "branch"—namely,

that such services are authorized banking services that, when provided to the public,[23] afford national banks a competitive advantage over competing state banks which are not authorized to provide such services at the same locations.

B. The Comptroller's Interpretation of the Act is Not Entitled to Judicial Deference

Petitioners argue that the Comptroller's determination regarding the applicability of the Act to securities brokerage services is entitled to deference and should be upheld because it gave effect to congressional intent as expressed in the language of section 36(f), and because it was based on a permissible construction of the statute, *i.e.*, it was a reasonable interpretation. In this case, however, no deference is appropriate because the Comptroller's position is plainly contrary to the intent of the McFadden Act.

Although courts may grant deference to an agency's construction of the statute it administers, courts are not bound to do so. As Professor Davis has observed:

> The law is not that courts use a reasonableness test in reviewing administrative determinations of questions of law, and the law is not that courts substitute judgment on such determinations; the law is

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[23] For example, banking services provided by national banks *exclusively to other depository institutions* would *not* fall within the "branch" definition as applied by the courts, because such services would not be offered to the public and therefore would not provide the type of competitive advantage proscribed by the McFadden Act. In this regard, it is noteworthy that the Bank Service Corporation Act, 12 U.S.C.A. §§ 1861-67 (West Supp. 1986), provides that a national bank or FDIC-insured state bank may invest in a bank service corporation which provides services at *any* location if such services are offered *only* to depository institutions. However, services offered to *other* persons may be performed *only* at locations permitted by the McFadden Act and state branching laws. *See* 12 U.S.C. §§ 1863 and 1864(c) and (d).

that courts have discretionary power either to use a reasonableness test or to substitute judgment.

5 K. Davis, Administrative Law Treatise § 29:16 (2d ed. 1984).

Professor Davis further notes that, in practice, this Court has frequently disregarded an agency's determination and substituted its own judgment for that of the agency. "Cases in which the Supreme Court substitutes judgment are quite numerous—far more numerous than deference cases. The Court substitutes judgment in some cases even when the question of interpretation involves policymaking within the agency's specialized area." *Id.*[24]

It has been demonstrated above that the Comptroller's determination is contrary to clear congressional intent in the McFadden Act. In such a situation, the Comptroller's interpretation is not entitled to any deference.

> Deference is not to be a device that emasculates the significance of judicial review . . . . A reviewing court "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.[25]

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[24] For example, in *Dirks* v. *SEC*, 463 U.S. 646 (1983), this Court reversed the determination made by the Securities and Exchange Commission that Dirks violated the antifraud provisions of the federal securities law, including § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. This Court conducted its own analysis of the elements necessary to establish a violation of Rule 10b-5, noting that the SEC's position differed little from the view that was rejected by the Court in an earlier case as inconsistent with congressional intent.

[25] *Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. at 142-43, *quoting Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31 (1981). *Accord, Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 627-28 (1971); *First Union Bank and Trust Company* v. *Heimann*, 600 F.2d 91, 99 (7th Cir. 1979); *IBAA* v. *Smith*, 534 F.2d at 935.

In this case, this Court's previous opinions establish that the Comptroller's interpretation of the "branch" definition is inconsistent with clearly expressed congressional intent. In *Walker Bank* and *Plant City*, the Court thoroughly reviewed both the language and the congressional intent of the McFadden Act, and concluded that "[t]he policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system", *Plant City*, 396 U.S. at 134, and that "[t]he congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency." *Id.* at 138. The Court accordingly refused to give the "branch" definition a "restrictive meaning which would frustrate the congressional intent . . . found to be plain in *Walker Bank*." *Id.* at 135.

This interpretative standard has been followed by the courts of appeal in consistently *rejecting* the Comptroller's restrictive interpretation of the definition of "branch" in the Act, as flatly contrary to congressional intent.[26] The Comptroller's interpretation in this case is no different than those repeatedly rejected by the courts and thus should be accorded no deference.

CONCLUSION

The courts below properly held that off-premises national bank facilities offering discount brokerage services are "branches" within the meaning and intent of the McFadden Act, and therefore may not be established unless competing state banks are authorized under state law to operate similar facilities at the same locations. The legislative history and judicial interpretations of the Act make it clear that Congress intended the "branch"

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[26] *See, e.g.*, cases cited *supra* notes 12 and 16.

definition to include not only facilities performing the three services specifically enumerated in subsection (f) of the Act, but also all other lawful banking services offered to the public that provide national banks a competitive advantage over state banks not similarly authorized. Discount brokerage services are authorized banking services under the National Bank Act, provide a potential competitive advantage to national banks, and therefore should be subjected to the geographic restrictions contained in the McFadden Act.

For the foregoing reasons, the decision below on the merits of the McFadden Act issue should be affirmed.

Respectfully submitted,

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